

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Part 97 of the)
Commission's Rules to Relax)
Restrictions on the Scope of)
Permissible Communications in)
The Amateur Service.)

PR Docket No. 92-136

To: The Commission

COMMENTS OF FREDERICK O. MAIA, W5YI

Frederick O. Maia, W5YI, by his counsel, submits the following comments in this proceeding. Mr. Maia is an Amateur Extra Class Amateur Radio Operator, first licensed in 1956. Besides his interest in Amateur Radio as a hobby, Mr. Maia is committed to serving the Amateur Radio Service through several related activities.

Mr. Maia's newsletter, The W5YI Report, was begun in 1978, and is the nation's oldest Amateur Radio newsletter. When the FCC sought to privatize the license examination function, Mr. Maia stepped forward to become a Volunteer-Examiner Coordinator (VEC). The W5YI-VEC was appointed in 1984 and today coordinates approximately one-third of the Amateur Radio examinations given nationwide.

Mr. Maia is devoted to growth in the Amateur Radio Service and the advancement of its members. Mr. Maia was one of the proponents of an entry level license not requiring Morse telegraphy proficiency. The creation of

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such a license by the FCC in 1991 has led to significant growth in the Service. Mr. Maia is also a source of training materials for Amateur Radio enthusiasts, which foster their advancement through the license classes as they master the skills of the radio art.

Mr. Maia is part of the Contributing Staff of CQ Magazine and a paid writer for other Amateur Radio related publications. He regularly participates in Amateur Radio forums and seminars around the country. He has filed comments and petitions in several FCC rule making proceedings. Currently he is active in the Question Pool Committee of the VECs, working to revise examination questions to reflect the constant changes that occur in Amateur Radio.

Mr. Maia is interested in this proceeding on two levels: first, as a licensed Amateur Radio operator, he is concerned about preserving the non-business character of the service while relaxing the rules to permit greater flexibility in the hams' use of their own spectrum. Second, as an entrepreneur, he is concerned about the impact the Commission's proposal might have on him and persons like him, who derive an income from activities related to Amateur Radio.

Mr. Maia agrees, in principle, that the Amateur Radio Service rules pertaining to prohibited business transmissions can, and should, be relaxed. The broad nature of the service and the interests of its members militate against hard and fast "no-business" rules. Given the variety of communications, participants, and possible circumstances that could arise, there are endless ways in which licensees can and do run afoul of the present "no business" rules and yet the Amateur Radio Service is not actually diminished.

In the instant Notice of Proposed Rule Making, the Commission has stated its desire to create a more flexible communications environment; to give Amateur Radio Service licensees more leeway in communications that might involve a pecuniary element. Yet this communications environment is created and defined by government regulations: regulations that are supposed to put licensees on notice as to what is or is not permissible conduct. These regulations carry significant sanctions for their violation. Flexibility and regulation are inimical concepts.

This tension between the two concepts is illustrated by the use of the term "regular basis" in the Commission's proposed regulations as the means by which rigid "no business" regulations could be made more flexible. Amateurs

could use their stations to tell other amateurs about ham gear that they would be willing to sell or trade, so long as they did not do so on a "regular basis" [Proposed Rule 97.113(a)(2)].^{1/} Similarly, amateurs could not transmit "on a regular basis" communications which could "reasonably" (another soft term) be furnished through other radio services [Proposed Rule 97.113(a)(4)]. Finally, amateurs could retransmit communications from U.S. Government stations, such as weather broadcasts, not "on a regular basis, but only occasionally, as an incident of normal amateur radio communications" [Proposed Rule 97.113(e)].

A swap net that meets every year on December 26 would be meeting on a regular basis. A police volunteer who patrols a neighborhood every evening would be doing so on a regular basis. Once a year, once a day, once an hour---it does not matter. If there is a set procedure or fixed interval for the activity, it is "regular" and therefore prohibited by the proposed rules. Mr. Maia is opposed to this outcome. A given type of conduct, say, operation of a swap net or a neighborhood safety patrol, should not be legal once in a while, but become illegal if, **in someone else's judgment**, it has become a "regular" occurrence. The standard of permissible conduct under such regulations is

^{1/} A close reading of the proposed rule would not appear to permit the actual negotiations to take place on the air.

simply not knowable. Under American jurisprudence, it is void for vagueness.

The sophistication and capabilities of modern Amateur Radio equipment and systems afford Amateur Radio licensees the opportunities to provide meaningful service to their communities. Such service is in fact a tradition in and a recognized purpose of Amateur radio. These same communications capabilities, however, also make Amateur Radio ripe for exploitation by persons, businesses and even public safety agencies, which may see an opportunity to obtain communications service at a fraction of the cost of commercial procurement.

For years the Commission has maintained the balance between public service and exploitation by means of the strict "no business" rules. Now the Commission is seeking to move the fulcrum yet still maintain the balance. It may not be possible.

The Commission's proposals would increase flexibility and yet balance exploitation by commercial interests and/or interests that have their own spectrum allocation, in three ways: 1) by continuing to forbid messages for hire or compensation; 2) by forbidding "on a regular basis" communications for which the Commission has established

other radio services; and 3) by forbidding all communications in which the sender or the employer of the sender has a pecuniary interest.

The history of and rationale for the prohibited communications rules was well documented by the American Radio Relay League in its petition for this rule making, RM-7895, and need not be reiterated. One fundamental regulatory objective emerges from ARRL's review: to keep the Amateur Service from becoming an alternative to the other radio services established by the Commission in its implementation of the Communications Act and international treaties.

Clearly that regulatory objective is primarily accomplished by continuing the ban on messages for hire. This is what distinguishes Amateur Radio from the common carrier services. It is inappropriate for Amateurs to charge or be paid for using their stations to transmit messages. In the proposed exceptions for control operators of certain club stations and teachers, the Commission is merely ruling in advance that their compensation is not the same as compensation for message handling.

However, if the Commission is trying to find a way to allow Amateur Radio to be more useful to hams, the rules as

proposed bring about the exact opposite result. Under these rules as proposed, non-hams actually derive more benefit than do hams.

Under the proposed rules, for example, there is no prohibition whatsoever against transmitting traffic on behalf of third parties, even if that traffic is directly related to their businesses. Under the proposed rule 97.113(a)(4), occasional communications on behalf of public safety agencies, who already have significant allocations of spectrum under Part 90 of the FCC's rules, are permitted. Yet under proposed rule 97.113 (a)(2), it would never be permissible for amateurs to engage in communications related to their own businesses.

In practical application this would mean hams could support the Iditarod dog sled race or the New York marathon (where the winners receive substantial monetary prizes) but not a ham fest where admission is charged and the sponsoring club derives income. Hams could provide communications logistical support for the Rose Bowl (a substantial money-maker for college football) but not "talk-in" for their own ham fests.

More to the point for Mr. Maia, these rules raise serious questions concerning communications between him or

his employees and the body of Amateur Radio licensees. For example, at long last, an Amateur Radio operator will be able to order a pizza without guilt via the autopatch feature of 2m repeaters. That same operator could contact Mr. Maia by radio to purchase an examination study guide, but Mr. Maia would not be able to respond except to do what he has always done in such situations, namely, invite that operator to continue the conversation via landline telephone. The same sort of communication via packet radio raises even more difficult considerations. Merely accessing a packet bulletin board to obtain posted announcements or other background material which may be used in a news article incurs a violation if the piece is published and any sort of remuneration is involved.

Mr. Maia is not here arguing to be allowed to use the ham bands to the advantage of his business. He is, however, illustrating the anomalous result under the proposed rules that his business --- a business of, by and for hams --- would remain completely shut out of the ham bands, while other interests that have nothing to do with ham radio, and that may even have their own spectrum, would be welcome with open arms. Mr. Maia's position is that if the FCC is going to permit commercial interests to benefit from Amateur Radio, then the commercial interests of hams themselves should not be excluded.

If Amateur Radio is to become more flexible, there is no way around increased commercial exploitation of the service, short of communications for hire. The limiting factor on exploitation by non-Amateur interests will become the individual licensee's willingness to participate in such communications.

As discussed above, attempts to limit the regularity of communications that may have some business content or that could be transmitted by other means, are unworkable. Forbidding all communications when the business content relates to the station licensee or control operator is an unfair and bizarre result. If the Commission is going to relax the "no-business" rules, it should be prepared to allow all business communications that the individual hams themselves are willing to transmit. In a non-broadcast, station-to-station service like Amateur Radio, the volume of such traffic is unlikely to diminish the service.

Moreover, many regulatory aspects of Amateur Radio are not to be found in the FCC's regulations. Rather, they are found in statements of good operating practice promulgated by the hams themselves. This is largely a self-policing radio service and the difficult subject of communications

that have a pecuniary component may be best left to such informal mechanisms.

Accordingly, for the reasons stated above, Mr. Maia believes the Commission should:

(1) accept the proposed §97.113(a)(1), as the only truly essential rule necessary to maintain the fundamental nature of the Amateur Radio Service;

(2) drop proposed §97.113(a)(2) and §97.113(a)(4), which impose needless and unworkable regulation; and

(3) delete the last sentence of proposed §97.113(e) and replace it with the sentence: "Propagation, weather forecasts, and shuttle retransmissions may be conducted as an incident of normal amateur radio communications."

Respectfully submitted,

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